IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 130 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

and

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

AMIRALI JAMALALI SAIYAD

Appearance:
1. Criminal Appeal No. 130 of 1989
MS B.R.GAJJAR, APP for Appellant
MR MH BAREJIA for Respondent No. 1

CORAM : MR.JUSTICE A.M.KAPADIA
and
MR.JUSTICE H.H.MEHTA

Date of decision: 26/02/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE H.H.MEHTA)

The State of Gujarat, has, by preferring this appeal under Section 378 of the Criminal Procedure Code, 1973 (for short 'Cr.P.C') read with Section 36-B of the Narcotic Drugs and Psychotropic Substances Act (for short 'NDPS Act') challenged the correctness, legality and validity of judgement dated 22.12.1988 rendered by learned Sessions Judge Kachchh at Bhuj (who will be referred to as learned Judge of the Trial Court), who presided over the Special Court constituted under Section 36 of the NDPS Act in Sessions Case No.57 of 1988, by which, the present respondent was acquitted of offences punishable under Sections 17 and 23 of the NDPS Act.

2. The facts leading to the present appeal in a nutshell can be summarised as follows:

2.1 On 31.5.1988, Police Sub-Inspector Shri K.J.Gohil while performing his duties in LCB Branch at Bhuj, had come to Gandhidham for some investigation in connection with a criminal case relating to offence of theft. He was in company of one Constable Laxmansinh Shivaji and Police Constable Maliram Baburam. As per the case of the prosecution, when they were at Bus station of Gandhidham, Shri Gohil received an information that one Amirali Jamalali Saiyad was keeping opium in his hand-cart of tea and was carrying on business of that opium from that hand-cart keeping it just opposite to office of Bajwa Transport Co. on Gandhidham-Bhachau highway road. On receipt of such information, he called two independent persons who can act as panch witnesses at Bus station. The panch witnesses were made to know about the information received by Mr. Gohil. A preliminary panchnama was drawn at Bus station and thereafter they left Bus station for the place of which information was received by him. They reached near one shop by name Nilkanth Automobiles on Gandhidham-Bhachau highway road and while they were crossing the highway road they found that there was one hand-cart of tea which was kept in the open land opposite to office of Bajwa Transport. They also found that one person who had put on sky-blue coloured Safari suit, was talking with another person. Meanwhile, that another person left the place of hand-cart. Immediately, thereafter they rushed to that person who had put on sky-blue coloured Safari suit. That person was interrogated. He mentioned his name to

be Amirali Jamalali Saiyad (who is respondent before this Court). Thereafter it was inquired from him about hand-cart. Respondent had informed that it was his hand-cart. Thereafter that hand-cart was searched in presence of panch witnesses. There was one shelf beneath the hand-cart. It was opened and from that shelf one cotton hand-bag was found. From that cotton bag 41 packets wrapped in a plastic paper were found. It is the case of the prosecution that all the 41 packets were containing opium. Those packets were weighed. It was found that total weight of those 41 packets was 240 gms. One piece of 10gms of opium was taken as sample for the purpose of analysis, and rest of the pieces, total weighing 230 gms, were packed separately. That sample of 10 gms of opium was packed and sealed as per the procedure prescribed and seal impression was put by keeping a paper-slip bearing signatures of panch witnesses on that sample. Similarly that packet of 230 gms was also packed and sealed, accordingly but separately. Thereafter, complainant came to Gandhidham Police Station. He lodged the complaint against the accused. He handed over the muddamal articles to the P.S.O. of Gandhidham Police Station. That complaint came to be registered as C.R. No. 84 of 1988. Thereafter, P.S.O. of Gandhidham Police Station handed over the Police investigation to Head Constable Raghunathsinh Ramswaroop. The muddamal sample was first sent to LCB office at Bhuj and thereafter that sample was sent from LCB office Bhuj to Forensic Science Laboratory (for short FSL) at Junagadh. On receipt of the report from FSL, the investigating officer filed a chargesheet in the Court of the learned JMFC, Gandhidham. The learned JMFC, Gandhidham, then, by passing an order under Section 209 of Cr.P.C., committed the case to the Court of Sessions, Kachchh at Bhuj where that case came to be registered as Sessions Case No. 57 of 1988.

2.2 The learned Judge of the Trial Court, after considering the material on record, framed charge against accused on 24.11.1988. That charge was framed for two offences; one under Section 17 and other under Section 23 of the NDPS Act. On recording the plea of the accused, accused pleaded not guilty to the charge and claimed to be tried. To prove the case against the accused for which charge was framed, the prosecution examined in all following 8 witnesses:

PW 1 Kishoresinh J. Gohil Exh.6
Complainant

PW 2 Ramesh Hasandas

Panch witness Exh. 8

PW 3 Devidas Chetandas
Second Panch witness Exh. 10

PW 4 Maliram Baburam
Police Head Constable Exh. 11
(One of the members of the raiding
party)

PW 5 Laxmansinh Shivaji Exh. 12
Police Head Constable
(Another member of the raiding
party)

PW 6 Raghunathsinh Ramswaroop Exh. 13
Police Head Constable
Investigating Officer

PW 7 Ravubha Alubha Exh. 14
Police Head Constable
(P.S.O. of Gandhidham Police Station)

PW 8 Veljibhai Jhandubhai Parmar Exh. 17
Police Head Constable
(The officer who filed the chargesheet in
the Court)

The prosecution, by producing and proving certain documents in support of the case against the accused, has placed reliance on some of the important documents, which are as follows:

(i) Panchnama Exh. 9
(ii) Report of FSL Exh. 15
(iii) Letter of FSL addressed Exh. 16
to P.S.I., L.C.B., Kachchh
at Bhuj

2.3 After evidence of prosecution was over, the circumstances appearing in the evidence of witnesses examined by the prosecution, were brought to the notice of, and explained to the accused, as a result of which further statement of accused under Section 311 of Cr. P.C. was recorded. Defence of accused is a complete denial of the case of prosecution. He has neither examined himself nor any witness in his defence. The learned Judge of the Trial Court, after hearing the arguments of the learned advocates for both the parties, and after analysing and appreciating the evidence on record, came to a conclusion that prosecution has totally

failed to prove the case against the accused for which charge has been framed beyond reasonable doubt. He has come to a conclusion that it is not proved by prosecution that muddamal opium was found from the conscious physical possession of the accused and on the basis of these conclusions, he, by rendering judgement dated 22.12.1988, acquitted the accused.

3. Being aggrieved against and dissatisfied with the said judgement of acquittal, the State Government has preferred this present appeal.

4. We have heard Ms. B.R.Gajjar, learned APP for the appellant-State of Gujarat and Mr. M.H.Barejia, learned advocate appearing for the respondent/original accused. Ms. B.R.Gajjar, learned APP has taken us through the entire evidence on record, oral as well as documentary. We have perused the impugned judgement and order of acquittal which is under challenge in this appeal. We have also perused the record and proceedings of the case which has been called for from the Trial Court.

5. Ms. B.R.Gajjar, learned APP for the appellant has argued that the learned Judge of the Trial Court has misread the evidence on record and that he has not properly appreciated the evidence in its correct perspective. She has further argued that the case is proved by the evidence of the complainant which is corroborated by the evidence of two other police personnel who were very much present when the raid was carried out. She has also argued that not a single provision of NDPS Act is contravened by the investigating officer. She has submitted that the learned Judge of the Trial Court has come to a wrong conclusion on his faulty finding, and therefore, this appeal deserves to be allowed. Lastly, she has further argued that looking to the evidence on record, the impugned judgement requires to be quashed and set aside, and accused be convicted and sentenced, in accordance with law.

6. Shri M.H.Barejia, learned advocate for the respondent/accused has supported the impugned judgement throughout. He has argued that relevant important provisions of the NDPS Act are contravened by the complainant and that there is lack of evidence to satisfy this Court as to how the muddamal articles travelled right from their seizure to reaching of that samples to the office of FSL. He has further argued that no representative sample of article was sent for analysis because only one piece of 10gms was sent for analysis to

FSL, and the report of FSL does not represent the report on the entire quantity which was recovered from the accused. He has argued that looking to the ambit and scope of Section 378 of Cr.P.C. and the powers of this Court, particularly, when this Court is hearing the acquittal appeal, this appeal deserves to be dismissed, because the learned Judge of the Trial Court has assigned cogent, convincing and plausible reasons. He has further argued that the learned APP who is representing appellant has totally failed to dislodge the reasons assigned by the learned Judge of the Trial Court. In view of this, he has further argued that the appeal deserves to be dismissed and impugned judgement requires to be confirmed.

7. We have dispassionately considered the submissions made by the learned advocates for both the parties. We have reanalysed and reappreciated the evidence, afresh to consider whether judgement requires to be reversed or not.

8. The officer Shri K.J.Gohil is a Police Sub-Inspector working in LCB Branch Kachchh at Bhuj, and therefore, he is not an empowered officer under Section 41(2) of the NDPS Act. At the best, he is an authorised officer under Section 42(1) of the NDPS Act, as argued by Mr. M.H.Barejia. This officer ought to have noted down the information which he has received at Bus station of Gandhidham. Looking to the evidence on record, the information which was received by him was with regard to a hand-cart which was kept in a public place for selling tea, and therefore in our considered view, Section 42(1) of the NDPS Act will not be applicable, because this was a search of an article in the public place, and therefore, to our mind, compliance of Section 42(1) of the NDPS Act was not at all necessary. Looking to facts of the case, Section 43 of the NDPS Act will be applicable.

9. As, 'person' of the accused was not searched, question does not arise for making compliance of Section 50 of the NDPS Act.

10. The important features which we have noticed while hearing this appeal are as follows:

(A) The complainant Shri K.J.Gohil has specifically stated in his complaint (Exh.7) that there was one shelf beneath that hand-cart of tea. That hand-cart was parked on a wooden stand. The shelf beneath the hand-cart was opened, and from that shelf, one cloth bag was found. On

searching that cloth bag, it was found that there were small packets of plastic papers. On counting those small packets, it was found that they were 41 in number. All packets were opened, and the substance which was found from those packets was weighed, and it was found that it was weighing 240 gms and 24 tolas. It was found that, that substance was opium. Out of that substance, 10 gms of opium was taken out and it was wrapped in plastic paper, then it was placed in one khakhi envelope, and thereafter that khakhi envelope was packed and sealed by placing paper-slip bearing signatures of panch witnesses, and seal of P.S.I. LCB, Bhuj was also put on that paper-slip. Rest of the article was similarly packed and sealed separately. That two articles were seized under panchnama in presence of panchwitnesses. In evidence, this complainant has deposed that on opening 41 packets, it was found that they were containing opium, and from that substance, one piece of 10 gms opium was taken separately and rest of the pieces weighing 230 gms were packed and sealed separately. Thus, a representative sample was not prepared by the complainant. In this connection, it would be profitable to refer to the reported decision of the Supreme Court in the case of GAUNTER EDWIN KIRCHER V. STATE OF GOA, AIR 1993 SC 1456, wherein, Hon'ble Supreme Court has held as under:

> "We have to observe that to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law."

Applying the aforesaid legal principle laid down by the Hon'ble Supreme Court to the facts of this case, in the present case, P.S.I. Mr. K.J.Gohil had picked up only one piece weighing 10 gm out of other pieces, and that sample was sent to the FSL. If we read the report of FSL (Exh.15), we find that the Senior Scientific Officer of FSL had received packet containing 7.840 gm of dark brown coloured material. The prosecution is not able to explain as to how this shortage in weight was found by the officer of FSL when the complainant himself has deposed that the piece of 10 gms was sent for analysis.

(B) The report (Exh.15) of FSL reveals that one paper bag sealed as P.S.I. LCB, Kachchh at Bhuj was received. The officer has not stated whether seal was intact or not. This aspect is required to be examined because the prosecution has not led any evidence as to how the muddamal article travelled right from the stage of its seizure to its reaching to the FSL. Complainant has deposed that he lodged the complaint in Gandhidham Police Station and handed over the muddamal article to P.S.O. Ravubha Alubha (Exh. 14). Ravubha Alubha has deposed that on 31.5.1988 he was Incharge of the Police Station of Gandhidham and at about 9:00 PM Shri K.J.Gohil had come to Police Station and lodged the complaint. He has further deposed that Shri Gohil also handed over the sample of opium along with complaint. He has further deposed that muddamal pavti was prepared, and thereafter, that muddamal was sent for analysis under a forwarding letter. He has deposed in cross-examination that he has no personal knowledge as to who carried that muddamal article to laboratory. Prosecution has examined investigating officer, Police Head Constable Veljibhai Jhandubhai Parmar (Exh. 17). He has admitted in his cross-examination that it was true that muddamal article was not sent to laboratory straightway from Gandhidham Police Station to Junagadh. According to him that muddamal article was sent by LCB Branch at Bhuj to Junagadh. He has further deposed that; first, that muddamal article was sent from Gandhidham Police Station to LCB Bhuj and thereafter it was sent from LCB Branch at Bhuj to laboratory at Junagadh. He has also deposed that he has no personal knowledge as to how this muddamal was sent from LCB office. It may be noted that muddamal article was seized by the complainant on 31.5.1988 as per receipt (Exh.15). As per letter (Exh.16) of FSL, muddamal article was sent under covering letter dated 9.6.1988, and as per letter (Exh.15), it was received by FSL on 10.6.1988. Thus, muddamal article which was handed over to P.S.O. of Gandhidham Police Station on 31.5.1988 remained in some one's custody till 9.6.1988. As discussed earlier, first, the muddamal was sent to LCB office and then from LCB office it was sent to FSL, Junagadh. So, that muddamal article has passed through hands of so many persons. The link with regard to this journey of muddamal article from Gandhidham Police Station to FSL is not satisfactorily proved by leading cogent and convincing evidence, and therefore, there is every possibility of tempering with the muddamal article, because, officer of FSL has not stated in his report that muddamal article was received with seal in intact condition. This is a major reason for not believing the case of the prosecution, because, after all, prosecution

has to prove the case with regard to possession of muddamal article which is found to be opium by the FSL.

(C) In this case, the prosecution has examined two independent panch witnesses, in whose presence muddamal article was found from the Tea hand-cart. They have not supported the case of the prosecution. They have merely admitted their signatures on paper-slips. Hence, the entire case rests on the evidence of complainant and members of raiding party. Generally, in this type of cases, they are interested to see that their raid is declared to be a successful raid, and therefore, in this type of cases, it is not advisable to place blind reliance on evidence of witnesses who were members of raiding party, particularly, in absence of corroboration from an independent witnesses.

(D) Fourth feature which we have noticed is that in this case complainant was Police Sub-Inspector, who is an authorised officer under Section 42(1) of the NDPS Act, and therefore, he was expected to comply with the provisions of Section 57 of the NDPS Act. There is not a slightest evidence produced by the prosecution to show that provisions of Section 57 of the NDPS Act were in fact complied with by Mr. K.J.Gohil. It is one thing that provisions of Section 57 of the NDPs Act are complied with, with certain variations or with some shortfalls, and it is another thing that there was a complete non-observance of the provisions of Section 57. In this case there is complete non-observance of Section 57 of the NDPS Act. Though, provisions of Section 57 of the NDPS Act are not mandatory but directory in nature, atleast prosecution must satisfy the Court that an attempt was made to comply with the provisions of Section 57 of the NDPS Act. Hence this non-observance of Section 57 of the NDPS Act is fatal to Prosecution.

11. We have come across an important case of GURBAX SINGH V. STATE OF HARYANA, 2001 CRI. L.J. 1166, to which attention was drawn to learned Advocates of both the parties. The facts of that case are practically similar to present case, because, in that case also, there was failure of investigating officer to make full report of all particulars to his immediate superior and to comply with the provisions of Section 57 of the NDPS Act. In that case, conduct of Panch witness was unusual as there were contradictions as to nature of seal used by I.O.. The Hon'ble Supreme Court, considering the facts of the case held that; conviction was not proper. The similar facts are found in the case on hand, because, panch witnesses have not supported the case of the

prosecution. There is complete absence of evidence with regard to journey of muddamal articles right from their seizure to reaching of that articles to FSL. The officer of the FSL has not noted down in his report that seals were found intact. There is complete non-observance of Section 57 of the NDPS Act. Therefore, on these counts, the case of the prosecution fails. The learned Judge of the Trial Court has rightly held that the case of the prosecution is not proved beyond reasonable doubt. He has assigned the reasons which are quite cogent, convincing and plausible. The finding is based on his reasons to which we are in full agreement.

12. We are conscious of the fact that in an acquittal appeal, powers of this Court are very much circumscribed and limited. The appellant is required to satisfy this Court that finding of the learned Trial Court is palpably wrong or manifestly erroneous or demonstrably unsustainable. No fact is produced to satisfy this Court to attract these three requirements.

13. In view of above discussion, we are unable to agree with the arguments of Ms. B.R.Gajjar, learned APP for the respondent State of Gujarat. She is unable to dislodge the reasons assigned by the learned Judge of the Trial Court to convince us to take a decision other than taken by the learned Judge of the Trial Court. Under the circumstances, this appeal fails.

14. For the foregoing reasons, this appeal is dismissed. Bail bonds executed by Respondent shall stand cancelled. Surety is discharged. Muddamal articles be disposed of in terms of directions given in operative part of impugned judgement.

(A.M.Kapadia,J)

(H.H.Mehta,J)

Jayanti*